

Singapore: The Tripartite Committee on Workplace Fairness - Interim Report

The Tripartite Committee was convened in July 2021 to review Singapore's workplace fairness framework. It has now released its interim report on its recommendations for the proposed Workplace Fairness Legislation, and the bill is expected to be proposed in Parliament in 2024.

In brief

The Tripartite Committee on Workplace Fairness ("**Tripartite Committee**") has released its **interim report** on 13 February 2023 with its 20 recommendations ("**Recommendations**") for the proposed Workplace Fairness Legislation.

In 2021, the Singapore government announced that it will be taking steps to enshrine the Tripartite Guidelines on Fair Employment Practices ("**TGFEP**") in law. The TGFEP, which is non-legally binding, sets out principles of workplace fairness and best practices for employers. While the TGFEP has improved standards of workplace fairness in Singapore, it does not have legal force. Enshrining the TGFEP in law is a significant step towards strengthening Singapore's stand against workplace discrimination.

The Tripartite Committee is of the view that the Workplace Fairness Legislation can enhance our current framework by:

- a. Strengthening Singapore's overall framework for workplace fairness;
- b. Providing more remedies for harm done due to workplace discrimination, beyond wrongful dismissal, including both monetary and non-monetary remedies;
- c. Providing more appropriate enforcement measures against discriminatory employers, which are calibrated to the severity of the discriminatory behaviour; and
- d. Formalising mediation as the preferred approach to resolve workplace discrimination disputes to preserve a non-litigious and harmonious workplace culture.

The Tripartite Committee has categorised the 20 Recommendations into four key topics. We summarise the Recommendations based on the four topics in **Annex 1** below, along with key details relating to each Recommendation.

Commentary

Legislating standards of workplace fairness and prohibitions against discriminatory conduct is a significant development in the Singapore employment landscape. If accepted by Parliament, the Workplace Fairness Legislation (which will complement the existing TGFEP) will provide recourse against discrimination in the workplace, and employers can face penalties for breaches of the law. Accordingly, it is worthwhile for organisations to start rethinking current employment practices and update employee policies, with a view to bringing them in line with the Recommendations.

We share below our initial thoughts on the Recommendations:

- a. While the Recommendations include a set of Protected Characteristics (see **Recommendation 1** below), there is no indication of how "discrimination" will be defined under the Workplace Fairness Legislation, and whether such definition should include both direct discrimination and indirect discrimination.

Briefly, "direct discrimination" occurs when a person is treated less favourably than others because of a protected characteristic, while "indirect discrimination" occurs when a requirement that applies equally to all persons has the effect of disadvantaging a particular class of persons because of a particular characteristic. In many jurisdictions (e.g., Hong Kong and Australia), both direct and indirect discrimination are unlawful.

In Hong Kong, the anti-discrimination laws provide that an act that is done for two or more reasons will be treated as having been done for the protected characteristic of the person, as long as one of the reasons for the act is the protected characteristic of the person - this is regardless of the dominant reason for doing the act. To avoid breaching

the law, employers in Hong Kong have to ensure that the protected characteristic is not a relevant consideration for any employment decision that is unfavourable to an individual. Likewise, for Singapore employers to implement effective policies and act within the law, the Workplace Fairness Legislation will have to provide clear guidance on what constitutes "discrimination".

- b. There is no explicit reference to sexual orientation being a protected characteristic under [Recommendation 1](#), unlike in other commonwealth jurisdictions such as England and Australia which have anti-discrimination laws. While sexual orientation is not covered under anti-discrimination laws in Hong Kong, the Hong Kong government introduced in 2014 a Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation ("**Code**"). Although not legally binding, the Code is intended to facilitate self-regulation by employers and employees in eliminating discriminatory practices in the employment context.

Against the backdrop of Singapore's recent repeal of section 377A of the Penal Code 1871 (which criminalises sex between male persons), it remains to be seen how Singapore will tackle discrimination based on sexual orientation in the employment context, if at all.

- c. It is no surprise that the Tripartite Committee recommends that the Fair Consideration Framework ("**FCF**") job advertising requirement be legislated in [Recommendation 5](#). This issue is currently addressed (albeit indirectly) through a provision in the Employment of Foreign Manpower Act 1990 ("**EFMA**") which provides that it is an offence to make a false statement or provide false information in any application or renewal of work pass.

As it is a mandatory requirement for employers who submit Employment Pass and S Pass applications to declare that they have complied with the job advertising requirement or are entitled to rely on an available exception, employers who fail to comply with the FCF, but proceed to submit the applications will be making a false declaration and breaching the EFMA provision. Legislating the FCF will provide the authorities a direct way to enforce the job advertising requirement.

- d. [Recommendation 6](#) is a positive step towards encouraging employees with genuine complaints of discrimination and harassment to come forward without fear of retaliation. This is likely to invite more employees who perceive that they have been discriminated against to file claims (however unmeritorious), given that it is relatively simple and inexpensive to file a claim in the Employment Claims Tribunal ("**ECT**"). The ECT's power to strike out frivolous or vexatious claim and order the unsuccessful party to pay costs (if [Recommendation 18](#) is adopted) will hopefully serve as an effective filter so that employers are not unnecessarily burdened by unmeritorious discrimination claims.

In cases where there are genuine reasons for the company to take action (which may be construed as retaliatory behaviour) against an employee who has filed a discrimination/harassment complaint, it may be difficult for the employer to prove that such act is not done in retaliation. Accordingly, to guard against retaliation claims, employers should ensure to keep internal records of its reasons for taking the action and relevant supporting documents. In exceptional cases, employers may consider going further to pre-emptively state in its internal records that the action taken is not retaliatory and set out its reasons in more detail.

- e. In view of [Recommendation 12](#), which requires employers to put in place proper grievance handling processes, employers who do not currently have such procedures should start thinking about implementing a grievance handling policy incorporating the proposed requirements to be legislated. Organisations that have a grievance handling policy only at the group level should also look into localising its group policies on grievance handling to incorporate the proposed requirements.

Feedback on the Recommendations

The Tripartite Committee is seeking public feedback with a view to publish the final report by end 2023. As we will be participating in the public consultation, we invite you to share your comments with us so that we can take into account your considerations when providing our feedback on the Recommendations.

If you would like to participate in this exercise, please complete the [short questionnaire](#) by 3 March 2023.

Annex 1: Recommendations by the Tripartite Committee

| No. | Recommendations |
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| Key Thrust A: Strengthening protections against workplace discrimination | |
| 1. | Prohibit workplace discrimination in respect of the following characteristics: (i) Age, (ii) Nationality, (iii) Sex, marital status, pregnancy status, caregiving responsibilities, (iv) Race, religion, language, (v) Disability and mental health conditions (collectively, the " Protected Characteristics "). |
| 2. | Retain and enhance the TGFEF to work in concert with legislation. The TGFEF will uphold overarching principles of fair and merit-based employment and provide protection against all forms of workplace discrimination. |
| 3. | Cover all stages of employment, i.e., the pre-employment (e.g., recruitment), in-employment (e.g., promotion, performance appraisal, training selection) and end-employment (e.g., dismissal) (" Employment Decisions "). |
| 4. | Prohibit the use of words or phrases in job advertisements that indicate a preference based on any Protected Characteristic. |
| 5. | Legislate the job advertisement requirement for submission of Employment Pass and S Pass applications under the existing Fair Consideration Framework. |
| 6. | Prohibit retaliation against those who report cases of workplace discrimination or harassment. The Tripartite Committee is of the view that the legislation should specify retaliatory actions that would constitute a breach, and it recommends prohibiting the following retaliatory behaviours: (i) Wrongful dismissal; (ii) Unreasonable denial of re-employment; (iii) Unauthorised salary deduction; (iv) Deprivation of contractual benefits; (v) Harassment; and (vi) Any other act done to victimise the individual who made the report (i.e., single out the individual for unjust treatment). |
| 7. | Include additional guidelines in the TGFEF to provide protection against discrimination for workers engaged in work through service buyers (e.g., property management companies) and intermediaries (e.g., platform companies providing matching services). |
| Key Thrust B: Provisions to support business/organisational needs and national objectives | |
| 8. | Allow employers to consider a Protected Characteristic in Employment Decisions if it is a genuine and reasonable job requirement. |
| 9. | Exempt small firms with fewer than 25 employees from the legislation for a start, with a view to lower the exemption threshold of 25 employees for smaller firms in five years. This approach recognises that smaller firms may not have the expertise and resources to implement the Workplace Fairness Legislation to the full extent at the start. |
| 10. | Allow religious organisations to make Employment Decisions based on religion and religious requirements (i.e., conformity with religious beliefs and practices) for any job role. This discretion will only be granted to religious organisations (" Religious Organisations "), which include: (i) Places of worship (e.g., church, mosque, temple); and (ii) Religious entities with solely religious purpose/function (e.g., bodies that organise, administer, or provide training on religion and religious affairs). <u>Religious Organisations</u> are still prohibited from discriminating based on other Protected Characteristics where there is no religious basis to do so. <u>Religion-affiliated entities</u> that have a secular purpose/function or serve the general public (e.g., religion-affiliated charities, hospitals, schools, childcare centres) will be allowed to make Employment Decisions based on religion only if it is a genuine and reasonable job requirement (e.g., staff responsible for delivering religious content in schools). |
| 11. | Allow employers to favour persons with disabilities and seniors (55 years and above) over other groups in hiring decisions, even if another candidate may be equally or more qualified. While this facilitates employment for these vulnerable groups of individuals, the candidate must still meet baseline job requirements, and in-employment decisions such as promotions will still be based on merit. |
| Key Thrust C: Processes for resolving grievances and disputes while preserving workplace harmony | |
| 12. | Require employers to put in place grievance handling processes. Employers should also protect the confidentiality of the identity of persons who report workplace discrimination and harassment, where possible. The proposed grievance handling requirements that are recommended to be legislated include: (i) Putting in place a proper inquiry and documentation process; |

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| | <ul style="list-style-type: none"> (ii) Informing employees of the firm's grievance handling procedures; (iii) Communicating the outcome of the inquiry to the affected employee; and (iv) Protecting the confidentiality of the identity of persons who report workplace discrimination and harassment, where possible. |
| 13. | Require compulsory mediation for workplace discrimination claims in respect of the Protected Characteristics at the Tripartite Alliance for Dispute Management ("TADM") first, with adjudication at the ECT as a last resort. |
| 14. | Ensure that the Tripartite Alliance for Fair and Progressive Employment Practices continue to provide advice and assistance to workers who experience discrimination and advise employers on improving employment practices. |
| 15. | Ensure that unions continue to play a constructive role in dispute resolution for workplace fairness. Allow unions to support their members in the claims process similar to other employment claims today. |
| Key Thrust D: Ensuring fair outcomes through redress for victims of workplace discrimination and appropriate penalties for breaches | |
| 16. | <p>Encourage parties to explore non-monetary remedies, such as reinstatement of an employment offer or providing an apology letter, where practicable.</p> <p>At mediation at TADM, the focus should be on correcting errant practices and mending the employment relationship where practicable, not monetary compensation.</p> |
| 17. | Allow monetary compensation of (a) up to S\$5,000 for pre-employment claims; and (b) up to S\$20,000 for non-union members and S\$30,000 for union-assisted claims, for in-employment and end-employment claims as with other employment claims today. |
| 18. | Empower the ECT to strike out frivolous or vexatious claims, or award costs of up to S\$5,000 against such claimants. |
| 19. | Allow the State to concurrently conduct investigations on claims that involve suspected serious breaches of the workplace fairness legislation, with a view to taking enforcement action. |
| 20. | Provide a range of penalties including corrective work orders, financial penalties, and work pass curtailment that can be imposed against firms and/or culpable persons, depending on the severity of breach. |

Contact Us



Celeste Ang

Principal

celeste.ang

[@bakermckenzie.com](https://www.bakermckenzie.com)



Kelvin Poa

Principal

kelvin.poa

[@bakermckenzie.com](https://www.bakermckenzie.com)



Ng Zhao Yang

Local Principal

zhao.yang.ng

[@bakermckenzie.com](https://www.bakermckenzie.com)



Shu Ying Chua

Associate

shu.ying.chua

[@bakermckenzie.com](https://www.bakermckenzie.com)

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